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8 UNITED STATES DISTRICT COURT
9 SOUTHERN DISTRICT OF CALIFORNIA
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11 KEVIN PARK,

12 Plaintiff,

13 v.

14 WEBLOYALTY.COM, INC., et al.,

15 Defendant.
16

Case No.: 12cv1380-LAB (LL)

**ORDER DENYING MOTION FOR
CLASS CERTIFICATION**

17 On May 19, 2009, Plaintiff Kevin Park purchased a gift certificate online for
18 his son from Gamestop.com. After entering his credit card information, Park saw
19 an offer for a coupon to save on his next Gamestop purchase. He clicked on the
20 offer, and was directed to a new window. He says he did not realize he had been
21 directed away from the Gamestop website to a new website. This new window
22 provided the details of the coupon offer and explained that by providing an email
23 address the customer would be agreeing to a subscription to a membership-fee
24 based program known as Complete Savings. Park says he did not look for and did
25 not see these disclosures, and did not intend to sign up for a membership program.

26 The enrollment page asked him to provide his email address twice and click
27 an acceptance button. By clicking this acceptance button, Park subscribed to a
28 fee-based membership program known as Complete Savings, operated by

1 Webloyalty. Park never re-entered his billing information for this subscription;
2 rather, the data was shared by a method known as “data pass,” which allowed
3 Webloyalty to obtain his billing information directly from Gamestop.com. Park says
4 that he was not aware that he had been redirected away from the website
5 Gamestop.com.

6 The first charge by Webloyalty was made one month later, on June 19, 2009.
7 Park says that in April of 2011 he discovered unauthorized charges to his bank
8 account totaling \$264, which were the charges made by Webloyalty. He requested
9 a refund, and Webloyalty granted him only a partial refund of \$48, for the four
10 previous months.

11 Park has brought this putative class action, with the putative class consisting
12 of all persons who did not directly provide their billing information to Webloyalty,
13 but who were charged for a subscription-based program at any time since
14 December 29, 2010. A different putative class action, *Berry v. Webloyalty.com,*
15 *Inc.*, 10cv1358-H (CAB) was filed in this District on June 25, 2010, and Park says
16 he was a member of the putative class in that case. The *Berry* decision was
17 vacated on appeal, because although Webloyalty had debited the plaintiff’s bank
18 account, it had later given him a full refund, resulting in his lacking a cognizable
19 injury. *Berry v. Webloyalty.com, Inc.*, 517 Fed. Appx. 581 (9th Cir. 2013). This
20 deprived him of standing, and the court of jurisdiction. *Id.* at 582.

21 The third amended complaint (“TAC”) brings claims under the federal
22 Electronic Funds Transfer Act (EFTA), California’s Unfair Business Practices Act,
23 Connecticut’s Unfair Trade Practices Act, and four state law causes of action
24 based on various theories of conversion. The state and federal unfair trade
25 practices claims are each divided into two claims, based on different theories, and
26 are to be brought by different putative classes. Under one theory, Webloyalty’s
27 practices of charging consumers’ credit or debit cards without obtaining expressed
28 informed consent, and of using information obtained through the “data pass”

process are unfair. Under the second theory, Webloyalty's practices are unfair because they violate the Restore Online Shoppers' Confidence Act (ROSCA). Claims based on alleged violations of ROSCA were brought in the name of a nationwide post-ROSCA class (based on Connecticut's unfair trade practices law) and a California post-ROSCA class (based on California's unfair trade practices law).

Now before the Court is Park's motion to certify this as a class action. The Court received briefing and held a hearing, and is now prepared to rule.

I. Proposed Classes

The TAC proposed to certify a nationwide class consisting of four classes: Class A, the Nationwide Class; Class B, the California Class; Class C, the Nationwide Post-ROSCA class, and Class D, the California Post-ROSCA class. In his motion to certify, Park seeks certification of only three classes: a California Class, a California Post-ROSCA Class, and a nationwide Debit Card Class. This order refers to the classes as defined in the motion, not the TAC.

The classes consist of people who 1) did not directly provide their credit card or debit card number, address, or "contact information" to Webloyalty, who then 2) had their credit or debit card charged or their bank account debited by Webloyalty for either a Complete Savings membership or any other club membership maintained by Webloyalty at any time since October 1, 2008. The California Class includes "all persons residing in California"¹ who fit this definition. The California post-ROSCA class includes everyone in the California Class who were charged by Webloyalty for membership fees after the enactment of ROSCA on December 29, 2010. The Debit Card Class consists of a nationwide class of people who fit within

¹ Presumably this means all persons residing in California when they were enrolled or charged for a membership. The claims of people who moved to California only later cannot be governed by California law.

1 the general parameters of the class and who either had a debit card charged or a
2 bank account debited. In its opposition, Webloyalty argued that parties who settled
3 an earlier class action and signed a release, and people who received a full refund
4 of membership fees should be excluded from the class definition. In his reply, Park
5 agreed, but only as to people who had received a full refund of fees.

6 **II. Procedural Posture and Law of the Case**

7 A number of issues have already been decided in this case, either by this
8 Court or by the Ninth Circuit panel. The Court must of course accept the panel's
9 decisions and treat them as binding. *See Snow-Erlin v. United States*, 470 F.3d
10 804, 807 (9th Cir. 2006) (holding that issues decided by an appellate court either
11 explicitly or by necessary implication are law of the case). While the Court is free
12 to reconsider its own decisions, it ordinarily will not do so except in unusual
13 circumstances. *See Pepper v. United States*, 562 U.S. 476, 506–07 (2011)
14 (discussing law of the case doctrine). The Court dismissed Park's first and second
15 amended complaints, the latter without leave to amend. Park then took an appeal.
16 The Ninth Circuit affirmed in part, reversed in part, and vacated in part. *Park v.*
17 *Webloyalty.com, Inc.*, 685 Fed. Appx. 589 (9th Cir. 2017).

18 The Court's dismissal of the second amended complaint was based, in part,
19 on the fact that Park had received a refund for the last four months of his fees. The
20 Court, relying on *Berry*, 517 Fed. Appx. at 581, instructed Park that his next
21 amended complaint should omit claims to the extent they were based on the
22 refunded charges. *See Park v. Webloyalty.com, Inc.*, 2014 WL 4829465, at *7–*8
23 (S.D. Cal., Sept. 29, 2014) ("First Dismissal"). Instead of doing that, Park proffered
24 a proposed third amended complaint that did not exclude any portions of the claims
25 arising from the refunded money. *See Park v. Webloyalty.com, Inc.*, 2015 WL
26 4560567, at *2 (S.D. Cal., June 22, 2015) ("Second Dismissal"). He instead
27 alleged that he had been injured merely by being charged \$48, in spite of the later
28 refund. He reasoned that he had been deprived of interest on the money and of

1 the use of his money from the time the charges were made until the time it was
2 refunded, about four months.² See *id.* The Court rejected this as inconsistent with
3 the holding of *Berry*, where the plaintiff experienced the same temporary
4 deprivation of his money. See *Berry*, 517 Fed. Appx. at 581.³ Park sought, and
5 continues to seek, damages based on the fact that the account from which the
6 money was drawn was an interest-bearing account, and he lost the interest he
7 would have earned on \$48 over four months. (TAC, ¶ 20.) He also says he could
8 have made profitable use of the \$48 by paying off other outstanding debt. (*Id.*) The
9 latter is necessarily a fallback argument, however; he could not have kept the
10 money in his account, drawing interest, and also spent it to pay off debt. This is
11 not enough to distinguish *Berry*, because those same issues were before the
12 panel, which found them insufficient to confer standing.⁴

13 On appeal, however, the appellate panel in this case rejected the holding of
14 *Berry*, and reversed the dismissal of Park's EFTA, ROSCA, and state law causes
15 of action *in toto*. Because neither party had drawn the panel's attention to the
16 refund issue and the jurisdictional problem, the Court itself sent a letter pointing it
17 out, as provided by Ninth Circuit General Order 12.10. The letter was received and
18 entered in the appellate docket. It pointed out that to the extent claims were based
19 on refunded

22 ² At argument on the motion for class certification, the parties agreed that the
23 refund represented the last four months' charges, post-dating ROSCA's enactment
24 in December of 2010. The parties agree he received the refund in April of 2011.

25 ³ Although *Polo v. Innoventions Int'l, LLC*, 833 F.3d 1193 (9th Cir. 2016) had not
26 yet been decided, the argument also appears to be foreclosed by that decision.
27 See *id.* at 1195 (holding that plaintiff bringing state-law consumer claims lacked
28 Article III standing because the money she paid had been refunded).

⁴ *Berry* also argued that he had standing because he lost interest on his \$36 for a
few months, and lost beneficial use of his money during that time. This contention
was discussed at oral argument, and the panel rejected this argument.

1 charges, the holding of *Berry* would require dismissal. The panel made no changes
2 to its order, however, and the mandate issued.

3 Following remand, Webloyalty moved to dismiss claims to the extent they
4 were based on money that had been refunded to Park. The Court summarily
5 denied the motion, explaining in a reasoned order why the panel's holding
6 prevented it. (See Docket no. 71.) Without repeating that order in detail here,
7 suffice it to say that the issue of jurisdiction was squarely before the panel, which
8 of course also knew its obligation to consider and resolve jurisdictional questions.
9 The panel knew Park had conceded that some of the charges had been refunded,
10 and that this Court had determined that claims arising from those charges were
11 moot. The panel nevertheless, making no distinction between claims based on
12 refunded and unrefunded charges, held that these claims should not have been
13 dismissed at all. The necessary implication of this decision is that claims arising
14 from refunded charges were not moot, and that Park has standing to raise those
15 claims. See *Snow-Erlin*, 470 F.3d at 807. In sum, the *Park* panel rejected the
16 holding of *Berry*. For purposes of this case at least, the Court must treat *Berry* as
17 having been repudiated and no longer good law.

18 What is less clear is whether the panel's decision meant that Park had
19 plausibly alleged secondary injury flowing from the charges (*i.e.*, lost interest and
20 loss of beneficial use of the money), or whether the charges themselves are
21 sufficient to confer standing. The only statutory damages he sought were in
22 connection with his EFTA claim on behalf of himself and a class of customers
23 whose debit cards were charged. (TAC, ¶53.) But the claims for unjust
24 enrichment, money had and received, and California and Connecticut unfair trade
25 practices statutes seek disgorgement of unlawfully held funds. To be sure, the
26 Court can order disgorgement of funds not yet refunded. But the TAC seeks a
27 refund of the entire amount Webloyalty withdrew from Park's account, and he
28 refused to amend his complaint to exclude requests for relief to the extent they are

1 based on money already refunded to him. It is difficult to see how Park has
2 standing to seek an order requiring Webloyalty to refund money it already
3 refunded. But with regard to Park's ROSCA-based claim, Webloyalty refunded him
4 the entire amount it charged him after the enactment of ROSCA. The Court
5 previously held that ROSCA does not apply retroactively to Park's claim, and this
6 is now law of the case. The Ninth Circuit found it unnecessary to reach this issue,
7 explaining that "Park's unfair trade practices claims survive dismissal on other
8 grounds." Because two of the unfair trade practices claims (one under Connecticut
9 law, one under California law) are based solely on alleged ROSCA violations, and
10 because Park had all his post-ROSCA charges refunded, the only cognizable
11 injury he suffered must be traceable to loss of interest and/or loss of beneficial use
12 of the \$48.

13 Adding to the complexity, Webloyalty's opposition to the certification motion
14 argued that consumers who received a full refund of their membership fees should
15 be excluded from the class definition, and Park said he did not object to this. (Reply
16 Br. (Docket no. 113) at 11:13–15.) This would have the effect of eliminating people
17 from the class who, under law of the case, have suffered cognizable injuries.

18 The first charge to Park's bank account was made on June 19, 2009. The
19 Court has already held that the EFTA's one-year limitations period began to run as
20 soon as he knew about the charge. The Court also held that under principles set
21 forth in *American Pipe & Construction Co. v. Utah*, 414 U.S. 538 (1974), he was
22 likely entitled to tolling as soon as *Berry* was filed, *i.e.*, June 25, 2010. But if the
23 limitations period had already run, tolling could not render his claim timely.
24 Because the Court accepted Park's proffer that he did not engage in online banking
25 and first received his bank statement in the mail sometime in July, 2009, the Court
26 held that the pleadings did not show Park's claim was untimely. The Ninth Circuit
27 commented on this holding without expressing either approval or disapproval.

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III. Standards

The proponent of a motion for class certification bears the burden of demonstrating that certification is appropriate. *Wal-Mart Stores, Inc. v. Dukes*, 564 U.S. 338, 350 (2011). “A party seeking class certification must satisfy the requirements of Fed. R. Civ. P. 23(a) and the requirements of at least one of the categories under Rule 23(b).” *Wang v. Chinese Daily News*, 737 F.3d 538, 542 (9th Cir. 2013).

The four requirements of Rule 23(a) are:

(1) the class is so numerous that joinder of all members is impracticable; (2) there are questions of law or fact common to the class; (3) the claims or defenses of the representative parties are typical of the claims or defenses of the class; and (4) the representative parties will fairly and adequately protect the interests of the class.

Fed. R. Civ. P. 23(a). These are commonly referred to as the numerosity, commonality, typicality, and adequacy requirements. The Court must perform “a rigorous analysis [to ensure] that the prerequisites of Rule 23(a) have been satisfied.” *Wal-Mart*, 564 U.S. at 350–51. Park seeks certification under Rule 23(b)(3), which applies where common questions predominate over individualized ones and a class action is the superior mechanism for dispute resolution.

“In determining the propriety of a class action, the question is not whether the plaintiff has stated a cause of action or will prevail on the merits, but rather whether the requirements of Rule 23 are met.” *Eisen v. Carlisle & Jacquelin*, 417 U.S. 156, 178 (1974) (internal quotation marks and citations omitted). See also *United Steel, Paper & Forestry, Rubber, Mfg. Energy, Allied Indus. & Serv. Workers Int’l Union, AFL-CIO, CLC v. ConocoPhillips Co.*, 593 F.3d 802, 809 (9th Cir. 2010) (citation and brackets omitted) (holding that the possibility that a plaintiff will be unable to prove his allegations is not a basis for declining to certify a class that otherwise satisfies Rule 23). The Court ordinarily has no authority to look into the merits of the suit, whether the Plaintiff will prevail on the merits, or whether he

1 has stated a cause of action. *Id.* at 808 (citing *Eisen*, 417 U.S. at 177–78). But the
2 Court may engage in substantive inquiry when considering issues such as
3 commonality, typicality, and predominance. *Id.* at 808–09. Therefore, the Court
4 considers the merits of the underlying claims to the extent that the merits overlap
5 with the Rule 23 analysis, but does not determine whether Park could actually
6 prevail. See *Wal-Mart*, 564 U.S. at 350–52 (explaining that required analysis often
7 entails some overlap with the merits); *Ellis v. Costco Wholesale Corp.*, 657 F.3d
8 970, 981, 983 n.8 (9th Cir. 2011).

9 As part of the Rule 23 analysis, for example, the Court may also consider
10 whether the class representative’s claims are subject to unique defenses. “A court
11 should not certify a class if ‘there is a danger that absent class members will suffer
12 if their representative is preoccupied with defenses unique to it.’” *Just Film, Inc. v.*
13 *Buono*, 847 F.3d 1108, 1116 (9th Cir. 2017) (quoting *Hanon v. Dataproducts Corp.*,
14 976 F.2d 497, 508 (9th Cir. 1992)). And the possibility that a class representative
15 will be forced to abandon remedies to the detriment of the class can be relevant to
16 the adequacy of representation analysis. *W. States Wholesale, Inc. v. Synthetic*
17 *Indus., Inc.*, 206 F.R.D. 271, 277 (C.D. Cal. 2002) (“A class representative is not
18 an adequate representative when the class representative abandons particular
19 remedies to the detriment of the class.”) See also *Taison Comm’cns, Inc. v.*
20 *Ubiquiti networks, Inc.*, 308 F.R.D. 630, 641–43 (N.D. Cal. 2015) (rejecting
21 plaintiffs as adequate representatives based on their willingness to forgo damages
22 in order to achieve class certification).

23 Of course, the Court must consider jurisdictional issues at any time, *sua*
24 *sponte* if necessary. *Gonzalez v. Thaler*, 565 U.S. 134, 141 (2012); *Grupo*
25 *Dataflux v. Atlas Global Group, L.P.*, 541 U.S. 567, 593 (2004). Here, these include
26 chiefly questions of standing. See *Spokeo, Inc. v. Robins*, 136 S. Ct. 1540, 1547–
27 47 and n.6 (2016) (holding that named plaintiffs in class action must personally
28 plead and establish Article III standing). Furthermore, the Court has both the

1 authority and the obligation to monitor the actions of the parties before it, to protect
2 both the absent class and the integrity of the judicial process. *Deposit Guaranty*
3 *Nat'l Bank, Jackson, Miss. v. Roper*, 445 U.S. 326, 331 (1980); *Hanlon v. Chrysler*
4 *Corp.*, 150 F.3d 1011, 1025 (9th Cir. 1998).

5 Although the Court generally accepts the substantive allegations made in the
6 complaint as true, it must also consider the nature and range of proof necessary
7 to establish those allegations. See *In re Petroleum Prods. Antitrust Litig.*, 691 F.2d
8 1335, 1342 (9th Cir. 1982); *Gomez v. Rossi Concrete, Inc.*, 270 F.R.D. 579, 585
9 (S.D. Cal. 2010). A party seeking class certification cannot rely on mere
10 allegations, but must affirmatively demonstrate that Rule 23's requirements are in
11 fact met. *Wal-Mart*, 564 U.S. at 350. To this end, the Court may consider the
12 parties' evidentiary submissions. *Keilholtz v. Lennox Hearth Products Inc.*, 268
13 F.R.D. 330, 335 (N.D. Cal. 2010) (holding that at the class certification stage, a
14 court may consider evidence that may not be admissible at trial).

15 Although the Court must act within the framework of Rule 23, it has "broad
16 discretion" when deciding whether to certify a class. *Zinser v. Accufix Research*
17 *Inst., Inc.*, 253 F.3d 1180, 1186 (9th Cir. 2001).

18 **A. Rule 23(a)**

19 Commonality requires that there be questions of law or fact common to the
20 class. Fed. R. Civ. P. 23(a)(2). "What matters to class certification is not the raising
21 of common questions . . . but, rather the capacity of a classwide proceeding to
22 generate common answers apt to drive the resolution of the litigation." *Dukes*, 564
23 U.S. at 350 (citation omitted). It is construed permissively, and indeed less
24 rigorously than the predominance requirement of Rule 23(b)(3). All questions of
25 fact and law need not be common to satisfy the rule. *Id.* at 368. One "significant
26 question of law or fact" common to the class may be sufficient to warrant
27 certification. *Abdullah v. U.S. Sec. Associates, Inc.*, 731 F.3d 952, 957 (9th Cir.
28 2013) (quoting *Mazza v. Am. Honda Motor Co.*, 666 F.3d 581, 589 (9th Cir. 2012)).

1 The typicality inquiry under Rule 23(a)(3) requires that the claims or defenses
2 of the representative parties be typical of the claims or defenses of the class. Fed.
3 R. Civ. P. 23(a)(3). The representative claims do not need to be “substantially
4 identical” to those of absent class members, just “reasonably coextensive.” *Hanlon*
5 150 F.3d at 1020.

6 Rule 23(a)(4) permits certification of a class only if the "representative parties
7 will fairly and adequately protect the interests of the class." This factor requires
8 that the proposed representative Plaintiffs do not have conflicts of interest with the
9 proposed class, and that Plaintiffs are represented by qualified and competent
10 counsel who will vigorously prosecute the action on the class's behalf. *Staton v.*
11 *Boeing*, 327 F.3d 938, 957 (9th Cir. 2003); *Hanlon*, 150 F.3d at 1020.

12 **B. Rule 23(b)**

13 In addition to establishing commonality, Park must still prove that common
14 questions of law or fact predominate over questions affecting only individual class
15 members. Fed. R. Civ. P. 23(b)(3). The predominance inquiry tests whether
16 proposed classes are sufficiently cohesive to warrant adjudication by
17 representation. *Amchem Prods., Inc. v. Windsor*, 521 U.S. 591, 623 (1997).
18 “When common questions present a significant aspect of the case and they can
19 be resolved for all members of the class in a single adjudication, there is clear
20 justification for handling the dispute on a representative rather than on an individual
21 basis.” *Hanlon*, 150 F.3d at 1022 (quotation omitted).

22 Superiority requires consideration of four factors. See *Zinser*, 253 F.3d at
23 1190. They are:

24 (A) the class members' interests in individually controlling the
25 prosecution or defense of separate actions;

26 (B) the extent and nature of any litigation concerning the controversy
27 already begun by or against class members;

28 (C) the desirability or undesirability of concentrating the litigation of the

1 claims in the particular forum; and

2 (D) the likely difficulties in managing a class action.

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4 Fed. R. Civ. P. 23(b)(3). When analyzing these factors, the Court must “focus on
5 the efficiency and economy elements of the class action so that cases allowed
6 under subdivision (b)(3) are those that can be adjudicated most profitably on a
7 representative basis.” *Zinser*, 253 F.3d at 1190 (internal quotations and citations
8 omitted).

9 While acting within the prescribed Rule 23 framework, the Court has “broad
10 discretion” to decide whether a class should be certified. *Id.* at 1186.

11 **IV. Discussion of Rule 23 Criteria**

12 **A. Numerosity and Commonality**

13 Because the claims all arise from similar enrollment processes, at least
14 some questions of fact or law are present. These include, among other things,
15 whether the general process Webloyalty used meant consumers gave valid
16 authorization for funds transfer under the EFTA. Because the enrollment
17 processes were similar, a number of questions of fact are likely present as well.
18 Park has briefed this issue, but Webloyalty’s brief does not cover it. This is a
19 permissive and less rigorous standard than the predominance standard, and the
20 Court finds this requirement is met. Numerosity is also easily satisfied.

21 **B. Typicality**

22 Here, Park hits his first hurdle. His claims are typical of the class in some
23 ways, but atypical in several others. Park’s claims arise from the same general
24 kind of enrollment process as the absent class members’ claims, and are governed
25 by the same law. As a general matter, the claims are based on a similar pattern
26 of behavior by Webloyalty, and are governed by a similar body of law. Park’s
27 certification motion surveys these similarities, which are substantial. But his claim
28 differs from the class claims in several significant ways. His EFTA claim is subject

1 to a statute of limitations defense that will require an individualized inquiry. His
2 damages for ROSCA-based claims are different in kind than those the post-
3 ROSCA class. He also seeks relief that he has no standing to pursue, although
4 other putative class members may.

5 The underlying facts differ somewhat as well, both between Park and the
6 class, and across the class.

7 **1. Factual Basis for Park's Claims**

8 Park has no memory of enrolling, and is unable to say, even with the benefit
9 of discovery, what representations or disclosures Webloyalty made to him at the
10 time. He cannot rely on anything the web pages he looked at said or neglected to
11 say as having misled him. Rather, he relies on the “dynamic enrollment” theory,
12 *i.e.*, that even if adequate disclaimers were given, the process itself was deceptive
13 and rendered them ineffective. *See Park*, 685 Fed. Appx. at 591–92 (describing
14 Park's theory). He has not directly alleged what about the process was deceptive,
15 but instead relies on indirect evidence, including statistical evidence regarding the
16 number of members who make use of their membership, anecdotal evidence in
17 the form of customer complaints, and a Senate report regarding Webloyalty's
18 earlier enrollment process. He also intends to rely on expert testimony.

19 Park alleges he was enrolled using the data pass process, which ROSCA
20 outlawed. His debit card was charged and his bank account debited both before
21 and after ROSCA's enactment, but he was given a full refund of the charges after
22 ROSCA's enactment. Park contends he received no benefit from his
23 membership, which he did not know he had purchased. In opposition, Webloyalty
24 points to evidence that he logged into the website on the day he enrolled, that he
25 logged in twice more after that, and that Webloyalty sent him 27 emails about his
26 membership, including two sent the day he enrolled. The initial email (Def.'s Appx.
27 at 2) tells new members they can log in directly by clicking on the links in the email.
28 That does not necessarily show Park opened or read the email, although that

1 appears to be one way he could have logged in. The email mentions the coupon
2 and gives instructions for how to redeem it. It also mentions (though not
3 prominently) that the monthly fee, to be charged to Park's credit card, was \$12.
4 Although the emails were sent to Park, the salutation used his minor son's name
5 because Park had used that name when buying a gift certificate. Park denies
6 receiving any of the emails.

7 **2. Factual Basis for Classwide Claims**

8 Park argues that the class members' enrollment experience was similar to
9 his. Webloyalty has pointed to evidence, which Park does not dispute, that various
10 parts of the enrollment process changed many times during the relevant period,
11 including the appearance of the web pages and email notifications sent to
12 enrollees. Park argues, however, that these were so minimal as to be immaterial.

13 Most of these changes appear to be minor, but the Court cannot agree with
14 Park's contention that they were immaterial. Because Park is relying on a dynamic
15 enrollment theory, changes to a warning's font size and color, and the ease with
16 which information is accessed are all material.

17 By way of example, one of the pop-up clickable buttons offering a discount
18 coupon towards an Allegiant Air reservation was accompanied by the statement
19 "By clicking above, you can claim your reward from our preferred partner. See
20 details." (Def.'s Appx., Ex. 3 at 47.) At another time, a similar button was
21 accompanied by the statement "By clicking above, you can claim your reward from
22 our preferred partner, Reservation Rewards." (*Id.*, at 46.) The second obviously
23 provides a greater degree of warning about what the consumer is agreeing to than
24 does the first, because it names a partner company that is not Allegiant Air.
25 Another pair of similar buttons offered a discount coupon for FTD.com. One (*id.*,
26 at 50) included a statement like that in the first example. A different button provided
27 much more detailed information: "By clicking above, you can claim your incentive
28 from Webloyalty when you join their service. Terms and conditions apply." (*Id.*, at

1 49.) These are examples, but are not the only variations. The layout, design
2 elements, wording, and font size and color also varied substantially among the
3 pages, such that the particulars of the page each customer looked at likely made
4 a significant difference as to how likely he or she was to be misled. (See Def.'s
5 Appx., Ex. 4.)

6 Among other things, some but not all of the pages prominently mentioned
7 the names of the membership programs, and congratulated customers on joining
8 the program or being a new member. Some included stock photos illustrating
9 things that members could obtain discounts on. In some cases these were clearly
10 unrelated to the coupon (see Defs.' Appx. at 52, 60–61), while in others they
11 appeared closely related. (See *id.* at 57–58.) The variation in the pages' layouts
12 could also be significant; one page walked customers through the enrollment
13 process, step by step, with large buttons next to each step, and the coupon offer
14 filled only about a quarter of the page. (*Id.* at 62.)

15 The enrollment process varied somewhat as well, depending on the retailer
16 partner's choices. Park argues that Webloyalty used one of two methods of
17 obtaining authorization: either customers had to enter their email address twice, or
18 they entered their email address twice plus the last four digits of their account
19 number.⁵ Webloyalty has also offered evidence that not all retailers used data
20 pass, and that different enrollments required entry of different information. Some
21 required customers to enter part of their credit or debit card number and some
22 others required customers to re-enter their entire credit or debit card number.
23 Webloyalty's evidence shows that some customers would not be included in the
24 class definition, because they were not enrolled using data pass. As to others, it
25 shows that the enrollment and authorization process would have been different for
26

27 ⁵ The evidence Park cites shows only that these were two of the methods used,
28 not that they were the only two. (Pl.'s Appx, Ex. 1 at 6.)

1 different customers. Some arrangements may have given them greater notice than
2 others that they were enrolling in a membership. For example, customers who had
3 to enter part of their account number may have had more reason to realize they
4 were not merely receiving a free coupon but were going to have to pay for
5 something. Those who had to enter their entire account numbers would likely have
6 had even more reason. (See Defs.' Appx. at 62 (web page requiring customers to
7 choose a credit card type, then enter their full account number and the expiration
8 date).)

9 What a jury would make of these differences is unknown, but they are not
10 immaterial. Variations in the web pages' appearances or in enrollment or
11 authorization process do not necessarily render claims atypical or inappropriate
12 for resolution on a classwide basis. But the material differences between different
13 customers' enrollment experiences are a factor to be considered.

14 The class definition makes no distinction among customers who knew they
15 were signing up for one of Webloyalty's programs, or who made use of the
16 membership programs later, and those who did not knowingly sign up or make use
17 of the membership program.

18 **3. EFTA Limitations Period**

19 Park's EFTA claim was initially dismissed because it appeared to be time-
20 barred. For reasons discussed in earlier orders, his claim was timely only if he
21 learned the basis of his EFTA claim on or after June 25, 2009. Because his
22 account was charged on June 19, 2009, it appeared he had notice earlier, and his
23 claim was time-barred by several days even with the benefit of tolling. But Park
24 amended his complaint, alleging that he did not engage in online banking and that
25 the first time he could have received notice of the June 19 charge was when his
26 bank statement arrived in the mail, which was sometime in July. Because of this,
27 the Court allowed his claim to go forward.

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1 Now, however, Park admits he did engage in online banking in 2009 (see
2 Def.'s Appx. at 101–03), and Webloyalty has pointed to his bank statement as
3 evidence his claim is time-barred. The June 19 charge for “Complete Savings” is
4 listed, along with a toll-free phone number. Like the other entries, which identify
5 the merchants' location, the charge says this merchant was based in Connecticut.
6 The closing date on this statement was June 22.

7 Webloyalty also points to evidence that Park logged into the Complete
8 Savings member site the same day he signed up, that he signed in twice more
9 before he says he realized he had signed up for the program, and that he received
10 numerous emails that would have put him on notice that he had been enrolled, all
11 before he says he discovered he was enrolled. Although he did not respond to
12 Webloyalty's assertions in his reply brief, at argument Park's counsel said
13 Park didn't remember logging in, and posited that Webloyalty itself had done it.
14 (Hrg. Tr. at 4:12–5:13.) His argument was based on Webloyalty's practices in
15 2003. (*Id.* at 5:2–6.)

16 The Court of course is not adjudicating the statute of limitations defense now.
17 But the fact that it has been squarely raised from the start of this litigation, and
18 Webloyalty has continued to raise and assert it diligently at every opportunity,
19 suggests it will continue to be an issue. This is understandable because this is
20 perhaps Park's most important claim, and it is clearly vulnerable. It remains a
21 rather thorny and fact-intensive issue. The facts necessary to establish this
22 defense (e.g., the particulars of Park's online banking habits, and whether he had
23 notice on June 19 or at least within a few days), are all unique to him. The fact that
24 this unique defense persists and is likely to persist is a relevant consideration.

25 **4. ROSCA-Based Damages**

26 Park received a full refund for the \$48 he was charged after ROSCA was
27 enacted. The class members, however, were not. Park instead argues that he
28 was injured because the \$48 was withdrawn from an interest-bearing account. He

1 also argues he could have made beneficial use of the money during the four
2 months it was not in his account, by paying off debt. The latter argument is
3 necessarily a fallback; he could not have both drawn interest on the money and
4 also used it to pay off other debt. Park has also not suggested that he would
5 actually have paid off debt, merely that he could have done so.

6 The important fact here is that the class members' injury is different; their
7 money was taken and not given back, and the TAC seeks disgorgement. Park, by
8 contrast, does not need the equitable remedy of disgorgement. He must seek
9 damages for temporary deprivation of his money, which none of the post-ROSCA
10 class members are seeking. Nor could they seek such damages on a classwide
11 basis; determining the amount of interest forgone or the value of lost opportunities
12 would necessarily entail highly individualized fact-finding.

13 Although Park seeks actual damages, they are so minuscule as to be less
14 than even the smallest nominal damages, and quite a bit less than any absent
15 class member. Park's Wells Fargo statement for activity ending June 22, 2009
16 shows that he was paid five cents' interest on a balance of \$1,552.46. Although
17 the parties have not provided any statements for the four months of 2011, if the
18 interest rate on his account remained similar, Park would have been deprived of
19 roughly a third of a cent in interest during the first four months of 2011. Although
20 an extremely small claim is not necessarily atypical, see *South Ferry LP No. 2 v.*
21 *Killinger*, 271 F.R.D. 653, 660 (W.D. Wash. 2011), Park's claim is based on a
22 different theory than the Post-ROSCA Class's claims, and requires somewhat
23 different proof. This will also be discussed in the adequacy of representation
24 section below.

25 **5. Injunctive Relief**

26 The TAC requests prospective injunction relief for Park's unlawful trade
27 practices claims. Article III standing is required in order for a plaintiff to seek
28 injunctive relief. *Friends of the Earth, Inc. v. Laidlaw Env'tl. Servs. (TOC) Inc.*, 528

1 U.S. 167, 185 (2000) (“[A] plaintiff must demonstrate standing for each form of
2 relief sought.”). This requires the threat of actual, imminent injury; “allegations of
3 *possible* future injury are not sufficient.” *Clapper v. Amnesty Int’l USA*, 568 U.S.
4 398, 409 (2013).

5 Cases involving false or misleading representations to consumers present a
6 special problem, because many consumers are unlikely to rely on or otherwise be
7 harmed by the alleged misrepresentations in the future. *See Davidson v. Kimberly-*
8 *Clark Corp.*, 889 F.3d 956, 969–70 (9th Cir. 2018). A cheated or deceived
9 consumer may, but does not necessarily, have standing to seek injunctive relief.
10 *Id.* (giving examples of how a consumer could establish standing to enjoin future
11 deceptive practices). Park has not shown that he is reasonably likely to sign up by
12 accident for any of Webloyalty’s membership programs again, or that there is any
13 other imminent threat of injury to him from anything he has accused Webloyalty of
14 doing. He therefore does not have standing to seek injunctive relief, although a
15 number of class members likely do.

16 **C. Predominance**

17 The parties’ briefing focuses primarily on this issue. Park’s motion points to
18 a number of common issues, which he argues predominate over individual issues.
19 Most of these focus on the enrollment process and the law governing the
20 authorization of charges. (Mot. at 14:6–15:12.) The Court agrees that most of
21 these are common to the class. The main reason some of them are not fully
22 common to the class is that they are based on a variable enrollment process.

23 Webloyalty points to a number of issues that are not common to the class,
24 and would need to be decided on an individualized basis. These include the class
25 members’ informed consent, and their reliance. The Ninth Circuit’s decision makes
26 clear these are both issues in this case. *See Park*, 685 Fed. Appx. at 592–92.

27 Park argues, essentially, that because Webloyalty used the same general
28 process or method to induce all class members to sign up, the claims are amenable

1 to adjudication by class action. His briefing suggests that any authorization
2 consumers gave to charge their cards in the course of such a process must be
3 invalid. The problem is that the process was not so utterly flawed or unfair that
4 meaningful consent was impossible. The evidence shows that the disclosures
5 Webloyalty gave during the enrollment process, at the very least, could be
6 adequate to shield Webloyalty from any liability. Earlier, the Ninth Circuit reversed
7 the Court's decision that Park had failed to plead a claim; the panel held that the
8 Court had improperly relied on documentation of disclosures that were given
9 during the enrollment process. *See Park*, 685 Fed. Appx. at 591 (holding that
10 judicial notice was improper), 592 (holding that reliance on documentation should
11 be reserved for a later stage of litigation). But at the class certification stage,
12 reliance on evidence is both permitted and appropriate. *See Wal-Mart*, 564 U.S.
13 at 350.

14 The variations in the enrollment method potentially create some
15 individualized issues. But a greater problem is that each claim Park is bringing
16 requires something more than merely showing what Webloyalty said or did. The
17 claims require a showing, not just of the potential for customers to be misled or
18 deceived, but that they actually were misled or deceived, and that their cards were
19 charged without valid consent. Some of the claims also require showing something
20 else as well. For example, the EFTA claim requires a showing that class members
21 did not receive a benefit.

22 A class may not be defined so broadly that it includes many members who
23 were not harmed by a defendant's allegedly unlawful conduct. *Torres v. Mercer*
24 *Canyons, Inc.*, 835 F.3d 1125, 1138 (9th Cir. 2016). That is a problem here. For
25 example, the class as presently defined includes everyone whose cards were
26 charged, including customers who intended to enroll in Complete Savings or one

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1 of the other membership programs and actually made use of their memberships.⁶
2 Those customers probably cannot establish an EFTA claim. See 15 U.S.C. §
3 1693a(12) (defining an unauthorized electronic fund transfer to require, among
4 other things, that the consumer “receives no benefit” from it). As to some of the
5 claims, it likely includes members who may not have realized during the enrollment
6 process what they were doing, but who were notified immediately afterward by
7 email and realized that they had.

8 The email Webloyalty says it sent Park, which Park denies receiving, would
9 have given class members clear notice that they were enrolled in a membership
10 program and had not merely signed up for a free coupon. (See Def.’s Appx. at 2.)
11 While it is possible they thought the emails were spam and ignored them, or that
12 the emails ended up in their email accounts’ spam filters, any class members who
13 read the email would have had notice that the coupon they requested had resulted
14 in their being enrolled in a membership program for which they would be
15 automatically charged \$12 per month. How many actually realized this is another
16 question.

17 Some of these problems might be addressed by defining the class differently.
18 For instance, the class might be redefined to exclude anyone who made use of
19 one of the membership programs. But even this does not solve the problem. It is
20 common knowledge that people buy memberships or subscribe to services they
21 intend to use but never do. In view of the disclaimers Webloyalty provided, an
22 unknown number of class members likely realized what they were signing up for,
23 and decided to enroll in one of the membership programs anyway. In those cases,
24 informed consent would prevent Webloyalty from being liable under any theory
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26
27 ⁶ Park offers no evidence and nothing else in the record shows how many of those
28 who signed up for Complete Savings or one of the other membership programs
actually used them.

1 even if the members later changed their minds or neglected to use the membership
2 discounts they had purchased. The fact that they had not used the discounts, in
3 other words, does not by itself show they have a claim. Separating someone in this
4 position from the class would require individualized fact-finding.

5 These problems are more pronounced in the state law causes of action for
6 civil theft, money had and received, conversion, and unjust enrichment, although
7 Park's certification motion only seeks certification of the conversion claim. Still,
8 conversion requires a showing that a plaintiff was deprived of ownership or
9 possessory rights by the defendant's wrongful act. Park contends this "turns on
10 common evidence, because it is based on Webloyalty's conduct." (Mot. at 102–1,
11 8:2–8.) But misrepresentations or a scheme intended to deceive, even if proved,
12 do not establish a claim for conversion. Under California law, plaintiffs suing for
13 conversion must also show they did not consent to having their property taken.
14 *Bank of N.Y. v. Fremont Gen'l Corp.*, 523 F.3d 902, 914 (9th Cir. 2008). Under
15 California law, consent need not take any particular form, and can be implied by a
16 plaintiff's action or inaction. *Id.* (citing *Farrington v. A. Teichert & Son, Inc.*, 59 Cal.
17 App. 2d 468, 474 (1943)). In this respect, conversion claims are even harder to
18 prove than EFTA claims. For example, if class members realized or led Webloyalty
19 to believe they knew they were being charged for memberships and did nothing,
20 they would have failed to establish the element of non-consent. At least some
21 class members apparently realized they were being charged.⁷

22 A related issue is whether class members received, opened, and read the
23 emails Webloyalty sent to class members notifying them of their membership, or
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26 ⁷ To support his claims, Park intends to rely on scripts that Webloyalty's
27 representatives used when customers called to ask about charges on their
28 accounts. The apparent goal was to persuade customers to keep their
memberships and allow Webloyalty to keep charging them. The exhibits do not
include these scripts, however.

1 any follow-up emails gave them notice that in requesting a coupon they had signed
2 up for a membership program for which they would be charged. Class members
3 who received emails and realized they were being charged, either immediately
4 after enrollment or some time later, would have either reduced claims or perhaps
5 no claim at all.

6 With regard to consent and reliance more generally, the fact that Park is
7 relying on the deceptiveness of the general process under a “dynamic enrollment”
8 theory is significant. If he could point to something that all class members were
9 told or not told, or even a group of communications that he believes were
10 deceptive, the inquiry might be different. Instead, it depends on methods of
11 communication that he alleges were intended to cause customers not to notice the
12 disclosures. For example, he alleges that after clicking on the coupon offer, a pop-
13 up window appeared on customers’ screens, asking them to enter their email
14 address and click on a confirmation button. (TAC, ¶ 10.) “Customers naturally
15 assume that they are providing their email address to receive the coupon . . . ,”
16 Park alleges. (*Id.*) The pop-up window allegedly “includes voluminous language
17 in relatively small text that is not visible without scrolling and maximizing the
18 window.” (*Id.*) Webloyalty’s purpose in doing this is allegedly to “discourage
19 consumers from reading the small print and to enroll those unsuspecting
20 consumers who do not see the ‘terms and conditions’ and disclosures provided.”
21 (*Id.*) The allegations rely heavily on allegations about customers’ mental states,
22 e.g., “unsuspecting,” “unknowingly,” “believe and rely,” and so on. (*Id.*, ¶ 10–11,
23 13.) But whether any given class member in fact did not see the disclosures, or
24 was unknowingly enrolled in a membership program is unknown, and cannot
25 readily be known without individual fact-finding. The allegations at most show that
26 the enrollment process was intended to lead more customers to enroll than
27 would have enrolled if the disclosures had been more prominent or the enrollment
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1 process more obviously labeled as such. At best, this means most of the class has
2 a valid claim.

3 Furthermore, although the TAC seems to imply that the class does not
4 include anyone who saw the disclosures (because they did not enroll), there is no
5 evidentiary support for this. Rather, exemplars of web pages and pop-ups that
6 Webloyalty has provided strongly suggest that a good number of people who
7 enrolled were given adequate disclosures, which they probably saw. This is not a
8 case where the entire class was deceived; rather, there is an unknown but
9 significant number of class members who were given adequate disclosures and
10 realized what they were signing up for. Park has not suggested any reasonable
11 way the latter could be excluded from the class without individualized fact-finding.

12 Webloyalty has also pointed to individualized statute of limitations issues in
13 connection with EFTA claims.⁸ As discussed above, Park's EFTA claim is time-
14 barred if he had reason to know about it earlier than June 25, 2009. But the same
15 is true for all class members. If they were bringing suit in their own name, they
16 would have to invoke California's discovery rule, *i.e.*, to show they did not know
17 the factual basis for their EFTA claims before June 25, 2009. This alone would
18 require a large amount of individualized fact-finding.

19 **D. Adequacy of Representation**

20 Park's motion makes strong arguments for his adequacy as class
21 representative, and Webloyalty has not offered any argument in opposition. The
22 briefing raises some concerns, however. Most of these are discussed in the
23 typicality analysis above. See *Amchem Prods. v. Windsor*, 521 U.S. 591, 626 n.20
24 (1997) (noting that adequacy inquiry tends to merge with commonality and
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27 ⁸ The parties' briefing discusses matters the Court has already ruled on, such as
28 tolling. For purposes of this order, the Court is treating Park and the class as
entitled to tolling beginning on June 25, 2010.

1 typicality criteria). But the Court also has concerns about Park's willingness and
2 ability to represent the class vigorously, and about conflicts of interest between
3 him and the class. *See Staton*, 327 F.3d at 957.

4 Park's EFTA claim is subject to a statute of limitations defense, both based
5 on the fact that he did engage in online banking and based on the fact that he
6 logged into his account on the day he enrolled. While he may prevail on this
7 defense, Webloyalty's focus on it shows it will be litigated. While the defense is not
8 unique to him—all other class members will also have to show their claims are
9 timely—the facts of his defense are unique. He will likely be forced to expend time
10 and effort on this, possibly to the detriment of the class. *See Just Film*, 847 F.3d
11 at 1116 ("A court should not certify a class if 'there is a danger that absent class
12 members will suffer if their representative is preoccupied with defenses unique to
13 it.'")

14 The fact that Park must sue under a different legal theory than the absent
15 post-ROSCA class members is a problem as well, even though his alleged injury
16 stems from the same underlying conduct. In addition to the typicality problem noted
17 above, the fact that he is suing for damages rather than disgorgement, and that
18 his claim will involve different proof creates a problem. Among other things, it
19 means he and Webloyalty are entitled to a jury trial as to this one claim, whereas
20 the class is not. *See Chauffeurs, Teamsters & Helpers, Local No. 391 v. Terry*,
21 494 U.S. 558, 570 (1990). The fact that he will have to prove indirect damages
22 means his claim is harder to establish than the absent class members' claims. He
23 has to prove what interest he would have earned, or what beneficial use he would
24 have made from the \$48, whereas the class merely has to show that their money
25 was taken and not refunded. Furthermore, the fact that his claim is minuscule
26 compared with the rest of the class, while not disqualifying, is a problem. Although

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1 class actions generally settle rather than go to trial, these irregularities provide an
2 incentive to settle for less than the fair value of the class's claims.⁹

3 The fact that Park lacks standing to seek injunctive relief means he cannot
4 represent a class that is seeking injunctive relief. *Ellis*, 657 F.3d at 986 (holding
5 that named plaintiffs in class lacked standing to sue for injunctive relief even if
6 some class members possessed standing); *Hodgers-Durgin v. de la Vina*, 199
7 F.3d 1037, 1045 (9th Cir. 1999) ("Unless the named plaintiffs are themselves
8 entitled to seek injunctive relief, they may not represent a class seeking that relief.")
9 In order to remain class representative, he would have to abandon this remedy.
10 This pits his interests against the class's interests, and makes him less adequate
11 as a representative. See *W. States Wholesale, Inc.*, 206 F.R.D. at 277 ("A class
12 representative is not an adequate representative when the class representative
13 abandons particular remedies to the detriment of the class.")

14 Another problem that the briefing on this motion has made apparent is that
15 Park appears willing, without explanation, to trade away some of the class's
16 remedies. His own claim, as representative of the California post-ROSCA class, is
17 based on charges that were later fully refunded. Yet in his reply brief, he acceded
18 to Webloyalty's suggestion that people who had received a full refund should be
19 excluded from the class. (Reply Br. at 11:13–15.) Admittedly, those he has agreed
20 to exclude from the class would have to rely on a "loss of beneficial use" theory as
21 to all their claims, and not just one claim as Park must do. At the same time, they
22 are the same kinds of claims. Park has offered no explanation for his decision,
23 and his reasons for agreeing to this are ambiguous. It might be purely strategic,
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26 ⁹ Depending on which other claims survived summary judgment, Park's claim
27 would be tried first to a jury, and the Court would afterwards be bound by the jury's
28 determination when deciding the disgorgement issue. See *Teutscher v. Woodson*,
835 F.3d 936, 944 (9th Cir. 2016).

1 because Park recognizes it would be difficult to litigate such claims on a classwide
2 basis—although, if that is so, it is unclear why Park’s own claim belongs in the
3 case. On the other hand, it might also suggest divided loyalties or a lack of
4 concern: Park is pursuing this claim on his own behalf so he can be class
5 representative, while agreeing to exclude from the class others with the same
6 claim.

7 Another problem with Park’s adequacy is that he does not remember the
8 enrollment process and is unable to testify about how he enrolled and how he was
9 deceived. Even after discovery, he has not alleged what process he went through,
10 what disclosures he was given or not given, and so on. His counsel argued that
11 his lack of memory made him typical, because most class members would likely
12 not remember enrolling. But typicality focuses on the parties’ claims or defenses.
13 Fed. R. Civ. P. 23(a)(3). However common it might be among class members,
14 forgetting the enrollment process does not make Park’s claims any more typical,
15 because memory of the process is not part of Park’s or the class’s claims. Park’s
16 lack of memory has also forced him to rely on indirect evidence in support of his
17 “dynamic enrollment” theory, rather than relying on what actually appeared on the
18 screen during the enrollment process and how it was displayed. If Park could point
19 to some kind of direct evidence of deception during the enrollment process, such
20 as his own experience, there would be fewer individualized issues and this would
21 be a stronger candidate for class action treatment.

22 **E. Superiority of Class Action**

23 A class action is superior when it will reduce the costs inherent in litigation
24 and promote efficiency, and the class members realistically have no other way to
25 vindicate their rights. *Valentino v. Carter-Wallace*, 97 F.3d 1227, 1234–35 (9th Cir.
26 1996).

27 Here, the amounts sought are fairly small. Bringing them all together in one
28 class action is likely to be more efficient and to reduce the costs of litigation. Many

1 of the claims are for several hundred dollars or more, and some could realistically
2 be brought in small claims courts where plaintiffs would not have to pay an
3 attorney. But in general, claims of that amount are more efficiently litigated as a
4 class action, provided a class action is feasible. *See Rannis v. Recchia*, 380 Fed.
5 App'x 646, 651 (9th Cir. 2010) (suggesting that trying claims for \$600 or less would
6 be costly and inefficient).

7 As discussed above, the fact that several of the claims require individual
8 factual inquiries adds to the difficulty of managing a class action.

9 **Conclusion and Order**

10 Although this order does not discuss every argument in the pleadings, the
11 Court has considered them as part of its analysis. The Court has also considered
12 counsel's arguments at the hearing.

13 The Court finds the commonality and numerosity requirements are met. The
14 typicality requirement is only partially met. Some of Park's claims are not typical of
15 the class, and he is subject to a statute of limitations defense based on facts unique
16 to him. He also lacks standing to seek injunctive relief, even though at least some
17 class members likely have standing. Park also does not remember the enrollment
18 process, which means he cannot point to anything Webloyalty said or failed to say
19 and instead must rely on indirect evidence to show that class members likely did
20 not see the disclaimers and likely did not knowingly consent to having their cards
21 charged. This, however, requires individualized fact-finding. With a different class
22 representative who remembered the enrollment process, many of these
23 individualized issues would be eliminated.

24 In addition, the class's EFTA claims may be time-barred depending on when
25 they first knew Webloyalty was charging their accounts. This too would require
26 extensive individualized fact-finding. Although a class action would be a superior
27 method of resolving these claims, the individualized fact-finding would render it

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1 unmanageable here. And for the same reasons, the Court also finds that individual
2 issues predominate.

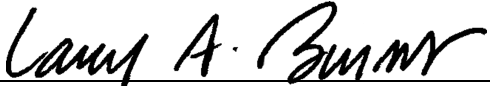
3 Park cannot represent the class as to some claims and theories, some of his
4 claims are different from the class's, and one of his claims is subject to a unique
5 defense. He also likely has some conflicts of interest with the class members and
6 may not represent their interests vigorously. For these reasons, the Court finds
7 him not fully adequate as a representative.

8 A class action would be a superior method of adjudicating the class's claims,
9 if a class could be certified. But having considered all the relevant criteria, the Court
10 concludes that a class should not be certified.

11 The motion (Docket no. 102) is **DENIED**.

12 **IT IS SO ORDERED.**

13 Dated: March 15, 2019

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16 Hon. Larry Alan Burns
17 Chief United States District Judge
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